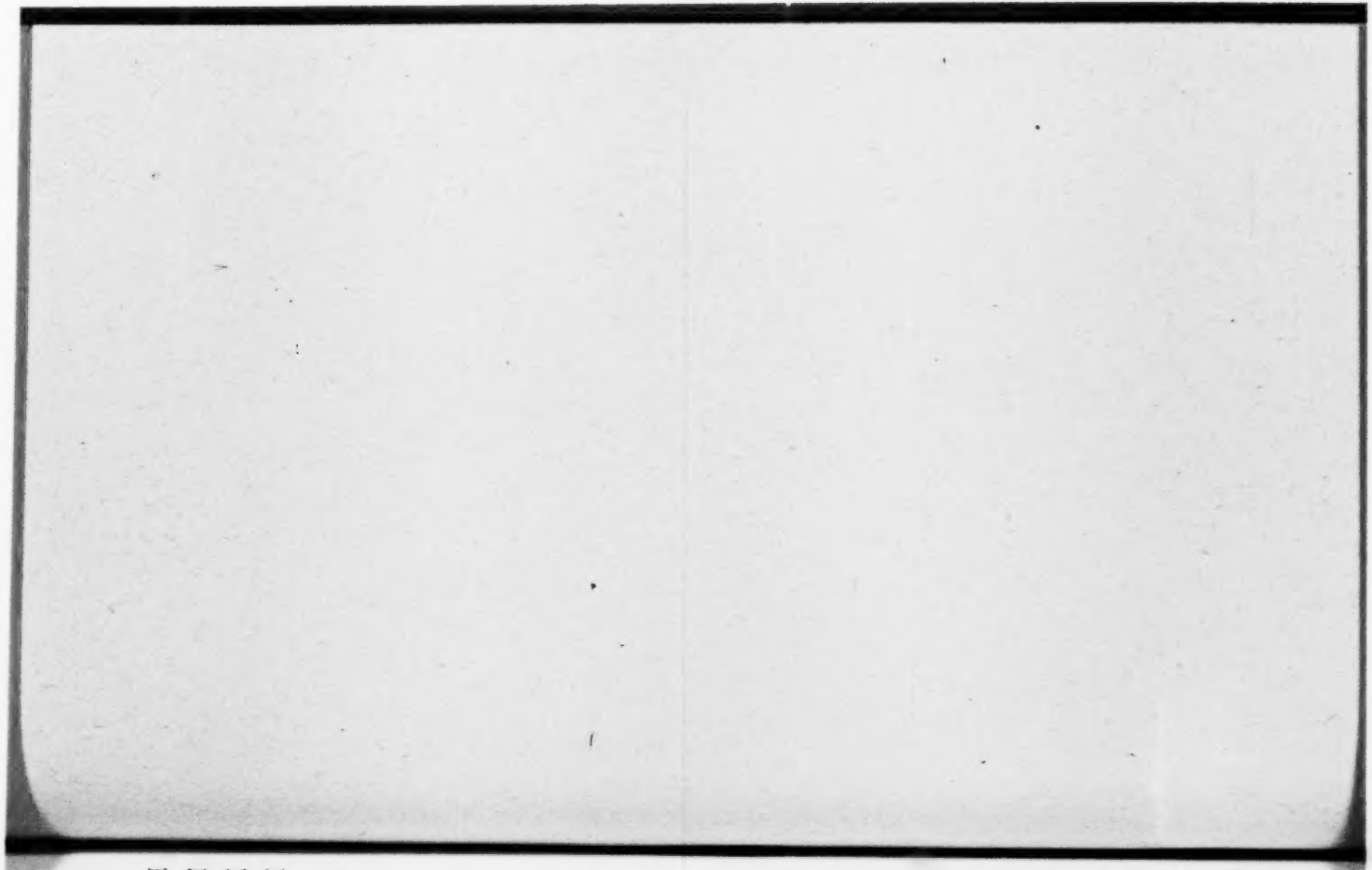

SUBJECT INDEX.

Table of Cases Cited.

PAGE

Table of Cases Cited (Continued).

Legal Articles.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 863

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,

Plaintiff,

vs.

JULIA MOORE, IONIA MOORE, RICHARD E. WESTBROOKS, doing business as ELLIS & WESTBROOKS and DR. N. ALFRED DIGGS,

Defendants.

JULIA MOORE,

Petitioner,

vs.

IONIA MOORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for the Respondent.

I.

The opinion of the court below is reported in 145 F. (2nd) 580.

II.

STATEMENT AS TO JURISDICTION.

Petitioner has set forth and claims that this court has jurisdiction under Section 5 of Supreme Court Rule 38 (P. 7).

The particular grounds on which jurisdiction is claimed, as we gather it from the jurisdictional statement (P. 7), are:

1) The court below decided an important question of law in conflict with applicable local decisions.

2) The court below departed from the accepted and usual course of judicial proceedings.

3) The court below deprived petitioner of her right to a trial upon issues determined by the Court of Appeals and by reason thereof petitioner has been deprived of her rights in a contract of insurance.

(1)

The case with which the decision of the court below is supposed to be in conflict is *Freund* v. *Freund,* 218 Ill. 189. That case is distinguished by the Court of Appeals in its opinion and by the Appellate Court of Illinois in *Sun Life Assurance Company* v. *Williams,* 284 Ill. App. 222, which is in accord with the weight of authority. There is no conflict and this court will not take jurisdiction on ground (1). The *Freund* case will be given attention in the argument.

(2)

In claiming jurisdiction on the ground that the court below departed from the accepted and usual course of judicial procedure, petitioner is referring to that portion of the court's opinion in which the court gives "as a

futher reason'' for affirming the judgment the fact, which is not denied by anyone, that Julia Moore shot her husband. (Tr. 49, 54, 70, 92, statement of Burroughs and the Court, Tr. 54-55, 88.)

The ground which we have numbered (3) is also based upon that portion of the court's opinion, 145 F. (2nd) 580, 584 (5).

This portion of the court's opinion does no more than to state a fact that is admitted in the record and says: (p. 584) (5)

> ''It is immaterial whether the shooting was accidental or intentional.''

Yet counsel take the view that the court was making a murderess out of petitioner, that she ''is crucified on a cross of suspicion'' (B. 40).

The words ''From the accepted and usual course of judicial proceedings'' refers neither to errors of law nor to minor departures from customary practice. It refers to matters of major concern to the integrity of the federal judicial process. Frankfurter & Hart, 48 H. L. R. 238, 274.

Counsel fail to direct this court's attention to any authority or to any body of opinion anywhere that supports the view that when a court takes notice of a fact admitted to be true in a record before it, the court has gone out of its way so far, in a matter of major concern to the integrity of the federal judicial process, as to invoke the jurisdiction of this court to correct it.

Petitioner has stated no grounds upon which this court will allow this petition and take jurisdiction of the case. The writ will not issue merely to give a defeated party another hearing. *Magnam Import Co.* v. *Coty*, 262 U.S. 159.

III.

STATEMENT OF THE CASE.

The Prudential Insurance Company of America filed an interpleader to determine the persons entitled to the proceeds of two group insurance certificates held by one St. Clark Moore at the time of his death on August 14, 1942. Ionia Moore, mother, and Julia Moore, wife, were rival claimants to the proceeds (Tr. 2-6).

Ionia Moore's claim was based upon a change of beneficiary executed by the insured under a right to do so reserved in each certificate and in the master policies back of them (Tr. 21, 23).

Julia Moore contends that no change of beneficiary ever took place for the reason that the change was not acknowledged by the insurance company until one day after St. Clark Moore died. In her answer she also claimed that his signature to the application for a change was a forgery; that there was undue influence and that he was mentally incompetent.

The United States District Court for the Northern District of Illinois, Eastern Division, upon findings of fact and conclusions of law entered a decree awarding the proceeds to Ionia Moore (Tr. 122, 123).

Julia Moore appealed to the Circuit Court of Appeals for the Seventh Circuit where the judgment of the trial court was affirmed (Tr. 142). All three judges of the court concurred in the result. Judge Major, in a statement separate from the opinion of the court, registered his disagreement with that portion of the opinion finding estoppel as an additional ground of affirmance (Tr. 150).

Statement of Facts.

The Court of Appeals includes a brief statement of facts in its opinion (Tr. 143). Petitioner includes a statement of facts in her petition (P. 5). We believe that in view of the character of the petition and brief, it will be of assistance to this court to give here a more detailed statement of the facts than is found in the opinion and a more accurate statement than is found in the petition.

It is said, for instance (P. 5):

> "The order that she could not see her husband was given by Dr. Diggs * * * at the request of Roberta Wigington, a niece of respondent."

The testimony was that St. Clark Moore requested the order (Tr. 116). The doctor alone could give the order (Tr. 117).

It is said (P. 5) that the relatives of St. Clark Moore made repeated demands that he change the beneficiary and that on August 10th he yielded to their demands.

The evidence is that Moore acted upon his own initiative. While one relative, Weems, a second cousin, testified that he requested Moore to make the change, he also testified that Moore wanted the change (Tr. 81). In any event, he personally had nothing to gain by the change, and it was not shown that his request, if he made it, had anything to do with Moore's decision to make the change.

It also is said (P. 5) that false statements were made about the wife while she was in custody of the police for the purpose of poisoning St. Clark Moore's mind against her, and refers to page 14 of the transcript to substantiate such allegation. This reference is not to any evidence, but is to a pleading, a counterclaim not in evidence, filed by

an attorney, in which he is attempting to lay the foundation for the recovery of attorney's fees.

In view of these and other misstatements as to what the evidence is, we make the following statement of facts in the case.

The Change of Beneficiaries.

The two certificates were issued by the insurance company on the 18th of June, 1942, designating Julia Moore as beneficiary. In each certificate St. Clark Moore, the insured, reserved the right to change the beneficiary. (Ionia Moore's Exhibits 3 and 4; Tr. 21, 23).

On August 6, 1942, under circumstances not explained in the record and, in any event, not material, St. Clark Moore was shot by Julia Moore, his wife (Tr. 49, 54). He was taken to a hospital, where he was operated on by a Dr. Diggs assisted by a Dr. Fells.

Julia Moore was taken into custody and held by the police from the 6th to the 10th of August (Tr. 97).

On the morning of August 10, 1942, John J. Leary, a group insurance investigator for the Pullman Company by whom St. Clark Moore was employed as a porter, was directed by his employer to go to the Provident Hospital and see Moore for the purpose of making a change of beneficiaries. He went there and after identifying Moore, said to him:

"I understand you want to change your beneficiary." Moore's answer was:

"Yes, I do. I want to change it from my wife to my mother."

Leary asked "Why?"

Moore said, "My wife shot me" (Tr. 49).

When Leary asked the mother's name, Moore spelled it out, I-O-N-I-A (Tr. 51).

At that time Moore understood what he was doing, and told Leary what to do (Tr. 51).

The forms used by the Insurance Company in changing the beneficiary were executed by Moore in the presence of several witnesses, one of whom, a nurse, Harriet Davis, together with Leary, signed as witnesses. Leary took the forms to his company's office, where, on the same day, he turned them over to the chief clerk (Tr. 55).

The transaction effecting the change occurred at about half past 10 o'clock in the morning and Leary was there only about five minutes for that purpose (Tr. 55).

All of the persons who were present at the time Moore executed the forms for the change of beneficiary who were called as witnesses at the trial, testified to the genuineness of the signature. No testimony was offered by Julia Moore to sustain her allegation that the signature was a forgery.

St. Clark Moore died four days later, which was the 14th day of August, 1942 (Tr. 111). Thus St. Clark Moore had done everything that was required of him or that he could do to effect the change. The certificate of recording the change of beneficiary was attached to the insurance certificate by the company at its home office in Newark, New Jersey, on the 15th day of August, 1942. (Ionia Moore's Exhibits 3 and 4) (Tr. 19, 20).

Moore's Competency to Make the Change of Beneficiary.

The testimony of every witness, who was in any position to know, was that at the time of the execution of the forms for the change of beneficiary St. Clark Moore was in possession of all of his faculties and entirely compe-

tent mentally and physically to effect the change. He told Leary that was what he wanted to do and why (Tr. 49). He named his mother and spelled her name for Leary (Tr. 51). He told Leary his wife's name (Tr. 53).

Dr. Diggs, who attended Moore from the time he reached the hospital until he died, testified that he was in a good mental condition, perfectly normal, on the morning of the 10th when he executed the forms (Tr. 106, 107, 108). He had the hospital records of the case before him when he testified and they showed nothing to indicate that Moore was not normal mentally (Tr. 107, 108, 110, 111, 112).

Harriet Frances Davis, the nurse in charge of the case at the hospital, so testified (Tr. 84).

Everett Hawthorn Fitzpatrick, a fellow-patient at the hospital with Moore, also, testified that Moore's condition was normal on the morning of the 10th of August (Tr. 62, 63).

And Leary, who brought the forms for him to sign, testified that Moore was perfectly sensible, understood what he was doing and told Leary what to do (Tr. 51).

Dr. Clemmons, called as a witness by Julia Moore, went to see Moore on the morning of the 10th and was in the room for about three minutes. He testified that, at that time Moore was delirious (Tr. 96). He saw Dr. Diggs there (Tr. 96). He made no examination of Moore (Tr. 96).

Dr. Diggs testified that when Dr. Clemmons was there the condition of Moore was good and perfectly normal (Tr. 106). He denied that Moore was delirious and denied that he had stated to Clemmons that the patient was delirious (Tr. 106). He also stated that because of the nature of the injury, there was no reason for the patient to be delirious (Tr. 106).

The witness Fitzpatrick testified on cross examination that Moore had told him previous to the morning of the 10th of August that he was going to change the beneficiary from his wife to his mother (Tr. 60). The court offered to instruct this witness to return as a witness for Julia Moore, if her counsel desired to prove by him the allegations in her answer on this phase of the case (Tr. 61). Counsel did not take advantage of this offer.

Although the witness Weems testified on cross examination that he asked Moore to change the beneficiary (Tr. 80), yet on the morning of the 10th of August, Moore did the talking (Tr. 79) and his voice was strong and he was under no handicap (Tr. 80). Moore talked to the witness on other occasions and told him things to do and witness cooperated (Tr. 80). He testified that Moore said he wanted the beneficiary changed to his mother (Tr. 81), and there is no evidence whatsoever that the change was made for any other reason.

The only other testimony directed at this question is that of Julia Moore and her sisters, Marie Sims and Geraldine Hardwick, who were not permitted to see Moore at the hospital.

Dr. Diggs testified that he issued the order that Julia Moore could not see the patient. The order was made at the request of St. Clark Moore. The doctor thought the request was a good one and in the interest of the patient (Tr. 116). Moore only wanted the members of the immediate family to see him (Tr. 117). A list of these was given the receptionist and the name of Julia Moore and her sisters were not included (Tr. 100). When Julia Moore went to the hospital, late in the afternoon of Monday, the 10th day of August, after the forms had been executed changing the beneficiary, she was told about the list of the persons who could see Moore and was told that it was the doctor's orders.

She testified to a conversation with a member of Moore's family, still later in the day, but it only reveals the bitterness between the wife and the family and in no way contradicts the testimony of Dr. Diggs to the effect that his order was based upon what he considered was for the best interests of the patient and was then given only upon the personal request of St. Clark Moore. There is no evidence that she or her sisters were excluded by, or by reason of the influence of, any of Moore's relatives. The exclusion was solely on account of the wishes of the patient and upon the doctor's orders. The patient's relatives had no authority either to admit or to exclude visitors.

The direct evidence on the question and every inference to be drawn from it is that the entire transaction was the voluntary and studied act of St. Clark Moore. He wanted the change of beneficiaries. He did not want his wife or her relatives to visit him. His relatives no doubt agreed with him in his desire for the change and in his desire to exclude his wife and her relatives from his sick room, but that is not evidence of undue influence in the matter of the change of beneficiary.

The Contested Issues.

The only contested issue before the trial, Appellate and this Court, is whether or not St. Clark Moore of his own volition changed the beneficiary from Julia Moore, his wife, to Ionia Moore, his mother.

Whether his wife shot him, accidentally or purposely, has never been an issue in the case, and the Court of Appeals did not inject that issue into the case.

IV.

ARGUMENT.

Summary of the Argument.

A.

The decision of the court is not in conflict with local law.

Under the provision in the certificates reserving the right in the assured, the change of beneficiary was made when Moore executed the forms for that purpose and transmitted them to the company through his employer. The act of the company in acknowledging the change was not a requirement in making the change but constituted the ministerial act of recording it and attaching the certificate of recording to the insurance certificates.

The opinion of the court is supported by the weight of authority and is not in conflict with *Freund* v. *Freund*, 218 Ill. 189. That case is distinguishable in that it was controlled by a New York statute, where the company was organized and maintained its home office. There is no similar statute in New Jersey where the Prudential Ins. Co. of America was organized with its home office in Newark, New Jersey.

B.

The court merely noted a fact admitted in the record before it to be true as an added reason for affirmance.

The fact that Julia Moore shot her husband was not made an issue in the trial court and was not injected into the case as an issue by the Court of Appeals. The fact was admitted to be true in both courts and the Court

of Appeals merely took note of it in giving it as an added reason for affirmance.

In noting the fact, alone, and in stating that it was immaterial whether she shot him on purpose or accidentally the Court of Appeals scrupulously avoided recognition of whatever implications might be found in the record before it and did no more than to apply a well established legal principle in further support of its decision which the court was already convinced was in harmony with the local law and the weight of authority.

A.

The decision of the court is not in conflict with local law.

Julia Moore was named, originally, as the beneficiary in the two certificates. Four days before he died, St. Clark Moore changed the beneficiary in these two certificates from Julia Moore, wife, to Ionia Moore, mother. The right to do this was reserved to him in the insurance certificate which provided that:

> "The beneficiary may be changed * * * by *said employee at any time* while the insurance on his or her life is in force by notifying the company through the employer" (Tr. 21, 23).

Moore followed this procedure to the letter. He executed the forms furnished by the insurance company (Tr. 19). Those executed forms were delivered on the same day of their execution by Leary to the chief clerk of the Pullman Company, Moore's employer (Tr. 55), and by it transmitted to the insurance company.

That completed the change of beneficiary according to the provision quoted above.

The certificates made the further provision that:

> Such *change* shall take effect when due acknowledgment thereof is furnished by the company to such person insured and all rights of his or her former beneficiary * * * shall thereupon cease (Tr. 21, 23).

The procedure followed in this case makes the meaning of this provision clear. "Acknowledgment" means no more than the indorsement of the change on the certificate. All the company did was to fill in a form with the number of the certificate and the group policy, type in the name of Ionia Moore, mother, and the date and fasten the form to the certificate.

The form so attached to the certificate (Ionia Moore's Exhibit 3) states:

> This is to certify that the following change has been recorded in connection with the insurance evidenced by certificate No. D 23982 under Group Policy No. G 4149 * * *.
>
> The beneficiary has been changed to—Ionia Moore, mother of the insured * * * (Tr. 20).

The form attached to Exhibit 4 is identical except the number of the certificate and Group Policy (Tr. 22).

The signature of the official of the company to the form is a facsimile reproduced on the form. The matter is of such routine nature that the official certifying to the change is not even required to write his signature. It is reasonable to conclude that he is never required to pass on it, but that the whole matter is taken care of by some clerk as a routine matter in the company's home office.

In any event, the certification that the change had been recorded is the "acknowledgment" that is furnished by the company to the employee.

The company recognizes this fact in paragraph 3 of its Bill of Interpleader filed in this case. It is there said: "and that said change was duly endorsed on said certificate of insurance by the plaintiff" (Tr. 3).

In the company's lexicon that was furnishing "due acknowledgment."

This routine procedure, it is contended by Julia Moore, renders the change of beneficiary made by the insured abortive for the mere reason that it purports to have been done after instead of before his death.

The leading case, decisive, we think, in this proceeding, is *Sun Life Assurance Company of Canada* v. *Williams*, 284 Ill. App. 222, 1 N. E. 2d 247, on which the court below rests its decision as representing the weight of authority.

In that case Vera Williams, divorced wife, and Carl S. Williams, father of Weir Williams, the insured, were rival claimants to the proceeds of an insurance policy issued by the plaintiff.

The company filed its bill of interpleader in court and deposited the proceeds with the clerk amounting to $9,451.81. Both claimants answered. The trial court awarded the proceeds to Vera Williams and Carl appealed.

The policy of insurance involved was issued by the company May 5, 1930, on the life of Weir Williams. Vera Williams, his wife, was named beneficiary.

The right to change the beneficiary was reserved in the policy and provided:

> "This policy is issued with the express understanding that, provided he has not assigned it or any interest therein, the assured may, without the consent of the beneficiary, (a) change the beneficiary * * * from time to time during the continuance of this policy by filing with the company a written request in such form as the company may require, accompanied by this policy, such change to take effect only upon the endorsement of the same on the policy by the company."

On June 20th, 1935, Weir Williams executed a form supplied by the company requesting that the beneficiary be changed to Carl S. Williams, father. Weir Williams died on the same day, June 20th, 1935.

The request for change of beneficiary was received at the home office of the company on June 25th, 1935, and on June 27th the change of beneficiary was endorsed on the policy by the company.

Vera Williams contended that because the endorsement of the change of beneficiary was not made on the policy until after the death of the insured, the change was ineffective.

Carl Williams contended that the insured had done all that was required of him to change the beneficiary; that the endorsement on the policy was merely a ministerial act, for the purpose of protecting the company and that when made, effectually accomplished the change.

It will be seen that the facts and the contentions made in that case are practically identical with the facts and contentions made in the case at bar.

The cases, *Freund* v. *Freund,* 218 Ill. 189, 75 N. E. 925; *McEldowney* v. *Metropolitan Life Ins. Co.,* 347 Ill. 66, 179 N. E. 520, and *Equitable Life Assurance Soc.* v. *Stilley,* 271 Ill. App. 283, cited by Julia Moore in her brief herein also were cited by Vera Williams in support of her contentions.

The Appellate Court of Illinois for the first district through Mr. Presiding Justice McSurely distinguished the cases cited and said in the case of *Sun Life Assurance Co. of Canada* v. *Williams* (284 Ill. App. 226-227; 1 N. E. 247, 248):

> "The designation of a beneficiary in the first instance is left to the exclusive wish of the insured; the insuring company is not concerned, except to be informed of the name of the beneficiary; where the right to redesignate the beneficiary is reserved in the policy, the insuring company is no more concerned than in the first instance; the change is not conditioned upon the consent of the insurer; the change, so far as any beneficiary is concerned, is effected when the insured in due form makes the change; the indorsement by the insuring company merely registers the name of the new beneficiary."

The Supreme Court of Illinois placed its stamp of approval on the holding in this case by denying petition for leave to appeal on June 12th, 1936, and on June 17, 1936, denied the petition to reconsider.

The decision has been cited and followed in numerous Federal Court decisions and in other jurisdictions.

The same principle was applied in *Holt* v. *Russell,* 30 Fed. (2d) 597, 600, and *Arrington* v. *Grand Lodge, etc.,* 21 Fed. (2d) 914, 916.

The case was cited and followed in *Mutual Life Ins. Co.* v. *Illinois Nat. Bank,* 34 Fed. Supp. 206, 209, and the principle was reaffirmed in *Larson* v. *McCormack,* 286 Ill. App. 206, 208; 2 N. E. (2d) 974; *Novotny* v. *Acacia Mut. Life Ins. Co.,* 287 Ill. App. 361, 364, 4 N. E. (2d) 978; *Thompson* v. *Metropolitan Life Ins. Co.,* 318 Ill. App. 235, and other cases.

Freund v. *Freund,* 218 Ill. 189; *McEldowney* v. *Metropolitan Life Ins. Co.,* 347 Ill. 66; and *Equitable Life Assurance Co.* v. *Stilley,* 217 Ill. App. 283, and all other cases cited by petitioner are distinguished by the courts which follow the Sun Life Ins. decision. They limit the authority of those cases to the narrow grounds on which they were decided, and they are uniformly held not to apply where the facts and circumstances are similar to those in the case at bar.

The principle of the *Sun Life Ins.* case is also controlling in New York under facts and circumstances similar to the facts in this case. *White* v. *White,* 194 N. Y. S. 114, 117; *in re Degenhardt's Estate,* 206 N. Y. S. 220; *Chatham Phenix N. Bank & T. Co.* v. *Travelers Ins. Co.,* 251 N. Y. S. 43.

The annotation in 78 A. L. R. 974 shows that the great weight of authority in this country is contrary to the holding in *Freund* v. *Freund,* 218 Ill. 189, and the decisions which have followed it, even on facts similar to those in the *Freund* case.

That case went off on a provision in a New York statute.

The New York Life Insurance Company which had issued the policy there involved had its home office in New York and was organized under the laws of New York. The statutory provision referred to required the consent of the company to any change of beneficiary.

Under the facts involved in the case, the Supreme Court of Illinois held that such consent had not been given.

In the case at bar, the Prudential Insurance Company of America was organized under the laws of New Jersey with its home office in Newark, New Jersey. There is no such statute in New Jersey as the one in New York which the court held to be controlling in the *Freund* case.

That case, on this basis alone, is distinguishable from the case at bar.

It is said that Mr. Justice McSurely based his opinion in the *Sun Life Assurance* case on the decision of the Supreme Court of New York in the case of *White* v. *White,* 194 N. Y. S. 114.

The court (284 Ill. App. 222, 225), based its decision upon the great weight of authority in this country (78 A. L. R. 974) and for the purpose of further distinguishing *Freund* v. *Freund,* 218 Ill. 189, from the decisions making up that weight of authority reviewed the *White* case at some length.

And the court did not quote from the *White* case for the purpose of distinguishing the *Sun Life* case before it as an "exception" to the *Freund* case but to support its determination to decide the case in accordance with the weight of authority on the subject.

The *White* case was not the foundation of the *Sun Life* case. The foundation of that case was the great weight of authority to which the *White* case added its contribution.

Petitioner, in addition to the cases just distinguished relies on certain New Jersey decisions. They are not only distinguishable on their facts, but represent the minority view in this country on the questions they decide.

They do not apply here in any event. The contract was made in Illinois. *Erie R. Co.* v. *Thompkins,* 304 U. S. 64.

In *Metropolitan Life Insurance Company* v. *Tesauro,* 94 N. J. Eq. 637, the insured wrote a letter directing the company to change the beneficiary, gave the letter and the policy to his wife and neither was sent to the company until after his death. His mother was named beneficiary in the policy and the wife demanded the proceeds. The mother, of course, was awarded the money.

In *Metropolitan Life Insurance Co.* v. *Zglienzenski,* 94 N. J. Eq. 300, there was a contest between an assignee of the policy and the beneficiary named in the policy. The assignee had failed to give notice of the assignment to the company, but after the death of the assured demanded the proceeds. No steps, whatsoever, had been taken to change the beneficiary or to comply with the requirements in cases of assignment.

In *Prudential Ins. Co.* v. *Fidelity Union Trust Co., etc.,* 102 N. J. Eq. 281, the insured in his life time had proved disability and the company allowed his claim for disability payments. At the time of his death the company had issued a check payable to him for that purpose, but had not delivered it. In a suit by the Executor under his will to recover the proceeds of the check for his estate, the court held, under Sec. 16 of the New Jersey Uniform Instruments Law that the transaction was not completed in deceased's life time and therefore the proceeds went to the beneficiary.

The remaining cases cited but not discussed in the Petition are all similar to those just reviewed which are obviously not in point.

Petitioner concludes that the foregoing New Jersey decisions control the case at bar "just as New York

law is the foundation of the *Sun Life*" and other cases. Neither of these conclusions is correct and furthermore, on these questions arising out of attempted assignments of insurance policies, these New Jersey decisions are contrary to the weight of authority, including the *Sun Life* and *White* cases, just as they are on questions arising out of a change of beneficiaries, 135 A. L. R. 1041-1058; 78 A. L. R. 974.

Moreover, there is no similarity of facts in these cases with the facts in the case at bar. It is so well established as to become a maxim of the law that a judicial opinion, like a judgment, must be read as applicable only to the facts involved and is authority only for what is actually decided. No one case, in any event, can necessarily decide another case under different circumstances and between different persons. This is particularly true here where St. Clark Moore complied strictly with the controlling provision in the policy in the change of beneficiaries from Julia Moore, wife, to Ionia Moore, mother. He made the change and placed the executed forms in the hands of his employer four days before his death. He died on the day before the company attached the certificate to his policies that the change had been recorded.

B.

The court merely noted a fact admitted in the record before it to be true as an added reason for affirmance.

There is no merit whatever in the contention that the court injected an issue into the case not considered in the trial court by giving as an additional reason for affirmance the fact that Julia Moore shot her husband.

In the first place, the full court is in agreement that the *Sun Life* case and the weight of authority in this country require that the judgment of the trial court be affirmed.

Two of the judges were of opinion that the fact that the only reason why the change of beneficiary was not recorded and certified before Moore's death was that petitioner shot him. Whether she did it on purpose or by accident, the court emphasized as not material. It was not material and no issue was made of it in the trial court where everyone, including petitioner's counsel, accepted it as a fact. Yet, counsel have raised a veritable storm about this portion of the court's opinion and contend with trembling eloquence that Julia Moore has not had her day in court and is being "crucified on a cross of suspicion." The case, they say, should be reversed and remanded for a new trial on this "issue" that was not regarded as an issue in the trial by anyone in the case.

We submit that the fact that the court referred to the shooting in its opinion is without any of the significance that counsel seek to attach to it. The court invoked a well established legal principle as an added reason why the judgment should be affirmed and nothing in what the court said has any element in it giving the slightest indication that the court was trying Julia Moore for the murder of her husband.

CONCLUSION.

It is, therefore, respectfully submitted that this case is not a proper one for review by *certiorari* in this court and that the petition for a writ of *certiorari* should be denied.

Dated this 15th day of February, 1945.

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